1989

City of St. George v. Brent Allen Turner : Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT FOR THE STATE OF UTAH

CITY OF ST. GEORGE,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	No.: 91[illegible]309
	)	89[illegible]207-CA
BRENT ALLEN TURNER,	)	88[illegible]001374
	)	
Defendant-Appellee.	)	

BRIEF OF APPELLANT

APPEAL FROM THE UTAH COURT OF APPEALS

CASE NO. 890620-CA

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IN THE SUPREME COURT FOR THE STATE OF UTAH

CITY OF ST. GEORGE, Plaintiff-Appellant, vs. BRENT ALLEN TURNER, Defendant-Appellee.	)	No.: 910309 890207-CA 881001374

BRIEF OF APPELLANT

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IN THE SUPREME COURT FOR THE STATE OF UTAH

CITY OF ST. GEORGE, Plaintiff-Appellant, vs. BRENT ALLEN TURNER, Defendant-Appellee.	)	No.: 910309

BRIEF OF APPELLANT

APPEAL FROM THE UTAH COURT OF APPEALS

JUDGES GARFF, JACKSON, and ORME

The Plaintiff-Appellant, City of St. George, by and through counsel, T. W. Shumway, submits the following brief in support of its petition for review of the judgment of the Utah Court of Appeals in this case.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1991. The City of St. George filed this timely appeal on July 5, 1991. This Court has jurisdiction under Sec. 78-2-2(3)(a), Replacement Volume 9, 1987 Ed., and Rule 45 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES ON APPEAL

1. DID THE APPELLATE COURT ERR IN FINDING THE DISPLAYS OF PLAINTIFF-APPELLEE TURNER DO NOT EXCEED MINIMUM THRESHOLDS OF OBSCENITY AS A MATTER OF LAW?

   A. Application of the Miller test: prurient interest.

   B. Application of the Miller test: patently offensive.

2. DID THE APPELLATE COURT INCORRECTLY DENY APPLICATION OF THE LOCAL COMMUNITY STANDARD IN EVALUATION OF THE TURNER MATERIAL FOR OBSCENITY?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the Constitution of the United States provides, in relevant part, that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances."

Article I, Sec. 15, of the Utah Constitution provides, in relevant part, that:

> "No law shall be passed to abridge or restrain the freedom of speech or of the press . . . "

St. George City Ordinance No. 2-77-2 provides, in relevant part, that:

> "a. "Obscene is a word descriptive of any material or performance which, when taken as a whole and considered in the context of the contemporary standards of this community:
>
> 1. Appeals to the prurient interest in sex;
> 2. Portrays sexual conduct in a patently offensive manner;
> 3. Has no serious literary, artistic, political or scientific value.
>
> * * *
>
> e. "Sexual conduct" includes any of the following described forms of sexual conduct if depicted or described in a patently offensive way:
>
> (2) Masturbation, excretion, excretory functions or lewd exhibition of the genitals, including any explicit close-up representation of a human genital organ or a spread-egale exposure of female genital organs."

STATEMENT OF CASE

This case, appealed to the Utah Court of Appeals from the Fifth Circuit Court, St. George Department, reversed the conviction of Brent Allen Turner for publicly displaying an obscene picture depicting sexual conduct in violation of St. George City Ordinance No. 2-77-2.

A preliminary review by the trial court resulted in denial of Turner's pre-trial motion to dismiss on a finding of sufficient basis for obscenity to satisfy constitutional safeguards. Turner's petition for permission to appeal from that interlocutory order was denied. The matter was submitted to the jury who rendered a verdict of guilty. Appeal was taken to the Utah Court of Appeals on October 12, 1989.

The facts are essentially centered in the drawings themselves, the same having been displayed along with other dissimilar drawings and phrases on wall hangings that decorated a public storeroom for the sale of tapes and albums of a heavy metal and punk rock nature. Nothing was seized, the store was not closed, but Turner was cited under the St. George obscenity ordinance.

SUMMARY OF ARGUMENT

To what limit should an appellate court extend its review of the finding by a local jury that material is obscene? The desirability of applying a contemporary community standard must yield to an infringement on constitutional rights of free speech

and expression. When does such an infringement occur? When minimum standards of obscenity are not met. See Miller v. California (1973), 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419. A consideration of those minimum standards and how they relate to Turner's wall decor is necessary in order to evaluate whether the action of the trial judge and the verdict of the jury were proper. This appeal argues that the decision in the trial court adequately safeguarded Turner's constitutional rights of free expression while finding two of the works in his shop to be obscene under the St. George ordinance.

The two prongs of the Miller test of major concern to the appellate court will be referred to as the "prurient interest" test and the "patently offensive" test, both appropriate matters for jury determination. The Turner renderings, of course, may fall short of what might be considered obscene in larger cities, but the community standards in St. George are at the same time considerably more conservative than those in larger urban areas, and the legal thresholds with which the court must be concerned were sufficiently met to allow the jury to determine obscenity as a matter of fact. Prurient interest and patent offensiveness are appropriate issues for review by an appellate court, but the primary issue remains that point at which constitutional concerns are satisfied as a legal matter and a community is free to apply its local standard to facts that exceed a minimum but are still in question.

ARGUMENT

I. THE MATERIAL PUBLICLY DISPLAYED BY TURNER APPEALED TO THE PRURIENT INTEREST.

A. Nature of Interest Aroused. The first prong of the Miller test would retain the reasoning in Roth v. United States (1957), 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, and a following case, Kois v. Wisconsin (1972), 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312, in determining whether materials appeal to the prurient interest. Miller at 413 U.S. 24. Roth and subsequent cases use language from the Model Penal Code in defining "prurient" - "a shameful or morbid interest in nudity, sex, or excretion." The Court of Appeals finds the expressions on the Turner bed sheets to be "too sketchy" to appeal to a shameful or morbid interest (App.A, P.8). That Court also finds they do not provoke any normal sexual interest (App.A, p.8). It might be asked what response the Defendant intended to cause when he hung them, and why they were left up if they evoked no interest. It is apparent that whatever interest the drawings aroused was sexual-related because of the subject matter, but in a morbid or unhealthy sense. The interest they arouse may not be great, but it is prurient; prurience cannot be disclaimed on the ground the materials provoke no interest, or on the absurd claim that they are of political interest. The Turner representations "impart a debasing, 'shameful and morbid' quality into the expression or depiction of human sexuality." J-R Distributors, Inc. v. Eikenberry (9th Cir., 1984) 725 F.2d 482.

B. Taken as a Whole. Is the prurient interest created by the two offending depictions diluted by inclusion in a collage dominated by other themes so as to make them non-obscene? This could be the case if they are clearly part of the totality of a larger unit and not readily divisible therefrom so as to constitute "a whole" by themselves. However, it is erroneous to read Miller as requiring that we view the bed sheets "as a whole"; obscenity can be intermingled with protected speech without losing its obscene nature, and in appropriate cases it can be separated from the protected material with which it is associated. Only if they are rationally relevant to a dominant theme can one consider the various drawings and slogans on the bed sheets as one integrated whole. Kois, 408 U.S. at 231. In that case, photos illustrating an article are integral parts of a larger whole. However, separate, unrelated articles in a magazine, even a political magazine, for example, do not form an integrated whole. Schauer[1] points out that a magazine article is intended to be read as a unit, but articles in the same magazine not necessarily related or read together should be evaluated separately. The same is true of a collage putting together disparate material. United States v. Merrill (9th Cir. 1984), 746 F.2d 458, differentiates such a collage from one where all aspects are "a fully integrated part of the whole":

> "The playing cards depicting oral sex are merely pasted onto the rest of the collages. They have no part in the theme and are not part of the message."

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[1] F. SCHAUER, The Law of Obscenity, 108-9.

A casual examination of the wall hangings in question reveals an analogous situation. Turner was unable to relate these drawings to the others in a rational manner (Tr, p.228), and the trial judge was justified after examination to find them to be "a whole group of unrelated things . . . juxtaposed next to one another" (Tr, p.207).

C. Separability. Further mandating a separate consideration of the offensive material is the fact that the remaining material would not be diminished nor would its message be affected in any way if the materials in question were excised. The Supreme Court recently held that total nudity could be removed from the expressive conduct of a dancer (by adding pasties) without constitutionally suppressing that expression. Barnes v. Glen Theatre, Inc., 59 L.W. 4745, 4748. The Court refers to United States v. O'Brien (1968), 391 U.S. 367, 376, 88 S.Ct. 1673, 29 L.Ed.2d 672, where limitations were allowed to be placed even though "speech" and "non-speech" elements were present in the same place. That reasoning would certainly allow the subject material to be separated from the rest of Turner's materials for specific consideration by the trier of fact, barring a more apparent interrelationship. The "taken as a whole" requirement has no application outside the context of an attempt to suppress the totality of a non-divisible work. Upper Midwest Booksellers v. Minneapolis (8th Cir., 1985), 780 F.2d 1389, 1391. In that case an ordinance was validated which required an opaque cover on the front of a book, thus suppressing its content from public view,

even though the interior of the book was appropriate "speech". The material on Turner's wall hangings similarly lends itself to an easy, natural division. Only the effort to tie it all together under some "dominant theme" is unnatural and contrived.

II. THE MATERIAL PUBLICLY DISPLAYED BY DEFENDANT IS PATENTLY OFFENSIVE.

A. Sexual Conduct. While not artfully done, the displays in question depict a clearly recognizable female form in recumbent position with legs spread to expose her genitals, and a close-up enlargement of a female vulva with dark pubic hair and folds of pink flesh. The latter is explicit, and both are lewd within the definition of the St. George ordinance. Are they patently offensive? The Court of Appeals found them sufficiently abstract as to permit a variety of non-obscene interpretations (App.A, p.3). That seems to concede availability of one interpretation that would make them obscene. The City suggests that any ambiguity in interpretation is quickly resolved by adjacent inscriptions such as "Tunnel of Love" (with arrow pointing to the vulva) and "Eat Me". The renderings are within the "plain examples" given in Miller, and this Court has referred with approval to a lewd exhibition of the genitals as constituting patently offensive "sexual conduct" as required by the Miller test. State v. Haig (Utah, 1978), 578 P.2d 837 at 845, 6 (Maughan, concurring). Cases following Miller have not required "explicit" sexual conduct in order to pass

constitutional muster. City of Urbana ex rel. Newlin v. Downing (Ohio, 1989), 539 N.E.2d 140, cert. den. 58 L.W. 3284.

B. Erotic Arousal. It was recognized by Miller and all cases since that the obscene is not limited to that which is erotic, contrary to Cohen v. California (1971), 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284, cited by the Court of Appeals (App.A, p.8). Placing obscenity within contemporary context, it must be observed that "obscenity is not merely about sex, any more than science fiction is about science."[2] The depictions here may well be indecent in a disgusting sense and offensive to the senses without sexually arousing the beholder. Profession Schauer's treatise, supra, effectively places the erotic element of obscenity in perspective at Page 102. Arousal should not be a necessary plank in the threshold utilized by the trial judge.

III. ONCE MINIMUM CONSTITUTIONAL PROTECTION IS PRESENT, A CONTEMPORARY COMMUNITY STANDARD IS APPLIED.

A case relied upon heavily by the Court of Appeals in its decision is Jenkins v. Georgia (1974), 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642, where the Court primarily discussed "patent offensiveness", the second prong of the Miller test. It properly notes that among examples given in Miller of the type of material falling within that standard is a "lewd exhibition of the genitals." It affirms that through the use of such examples,

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[2] IRVING KRISTOL, On the Democratic Idea in America 35-56 (1969).

Miller "intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material" that can properly be considered patently offensive. (Jenkins, 418 U.S. at 160). The material in Jenkins was nudity only, not a genitalic display. Focusing on the material in question, the Turner jury found as a fact that the depictions were patently offensive. A verdict based on the contemporary standards of St. George must be respected unless it fails to meet the minimum Miller standards.

The majority opinion (App.A, p.6) states that the Jenkins court "substituted its judgment for that of the jury" because the Miller test was not met. It would be more accurate to characterize the Jenkins court as determining that the jury's judgment could not be sustained because it failed to meet the minimum standard of patent offensiveness. "To substitute for" implies a right to second-guess and disagree with the perception of a particular jury from the community. The Court of Appeals did that in this case. An appellate court should instead exercise a more objective function and only require a verdict from the community to successfully meet the measure of a minimum standard, without interposing its own subjective judgment. A jury's verdict should be rejected if it fails to meet the minimum standards. Meeting those standards, however, it should not be supplanted just because it may differ from another's studied perception of the material. Only by exercising some restraint in the substitution of its own judgment can an appellate court assure compliance with constitutional thresholds and still avoid disabuse of a community

right to apply its contemporary local standard. Objective application of the Miller criteria will protect constitutional rights from the whim of a jury, and at the same time it should prevent unnecessary usurpation of a jury's right to make an obscenity determination in the context of community standards.

As discussed in detail by the Court in Hamling v. United States (1974), 418 U.S.87, 102-107, 94 S.Ct. 2887, 41 L.Ed.2d 590, Miller changed prior law by emphasizing the need to measure obscenity with such local criteria. A state body, whether court or legislature, may very appropriately deal with constitutional minimums, but it must delegate to local citizenry the right to define the standards in their community. Smith v. United States (1977), 431 U.S. 291, 300-303, 308, 97 S.Ct. 1756, 52 L.Ed.2d 324. Application of the necessary minimums should be carefully done so as to protect the jury's right to find facts in an area where it is deemed to be expert. The Appellate Court in the majority opinion has not applied the Miller test with desired finesse, but rather has sculpted minimum standards with such heavy hand that the jury's role has been preempted well beyond the point necessary to afford constitutional protections.

IV. WHERE MATERIALS ARE TARGETED AT JUVENILES THE COURT SHOULD GIVE CONSIDERATION TO THAT FACT.

As the Turner shop was near a high school in a residential neighborhood, was open only during hours when youth were not in school, and admittedly drew patrons from the high school (Tr,

p.236), the City has argued it should be given benefit of the doubt on any application of minimum standards. This is on the rationale in Ginsberg v. New York (1968), 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, and later cases, which permit a broader interpretation of obscenity where the materials are typically made available to children. The Court of Appeals would deny any consideration of the age of those viewing the subject material, based on the reasoning in Erznoznik v. Jacksonville (1975), 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (App.A, p.4,n.5). The Appellant's obscenity ordinance does not purport to regulate speech as to time, place, and manner, as in that case, and it does not address content except to attack content that is obscene on the basis that it is not "speech" and thus is not entitled to protection. Erznoznik mentions the Ginsberg holding with approval, but it did not deal with the question of obscenity, rather with the regulation of non-obscene material. The post-Ginsberg cases which acknowledge the need for a heightened sensitivity where minors are involved, such as Erznoznik and State v. Haig, 578 P.2d at 844, even if dicta, do not suggest that the Miller test be supplanted with something different in the case of juveniles. (But see United States v. Dost (S.D.Cal, 1986), 636 F.S. 828, 831) Instead they seem to recognize that the measure of First Amendment protection to which children are entitled may not be quite as great as in the case of a mature, discerning adult. The juvenile dimension in Turner's business should not have been rejected as a factor for consideration in the interpretation and application of minimum standards. A jury is

entitled to examine the manner in which materials are promoted and disseminated in making determination of whether they are obscene. Hamling v. United States, 418 U.S. at 130; Splawn v. California (1977), 431 U.S. 595, 598, 97 S.Ct. 1937, 52 L.Ed.2d 606.

CONCLUSION

The Court of Appeals reversal of Turner's conviction appears to misapprehend the fundamental nature of the appropriate inquiry into legal minimums posed by the Miller test. Moreover, it is not clear whether it finds the drawings to not be obscene because by their very nature they fall short of meeting minimum thresholds of prurient interest and patent offensiveness, or whether the drawings alone may be obscene but lose that characterization because they merge into a larger whole which, on balance, does not meet the thresholds. The sensitive relationship between application of law by the court and determination of community standards by the jury has been violated, and the decision of the lower court should be reinstated.

RESPECTFULLY SUBMITTED,

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December 2, 1991

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed four (4) true and correct copies of the foregoing Brief of Appellant to:

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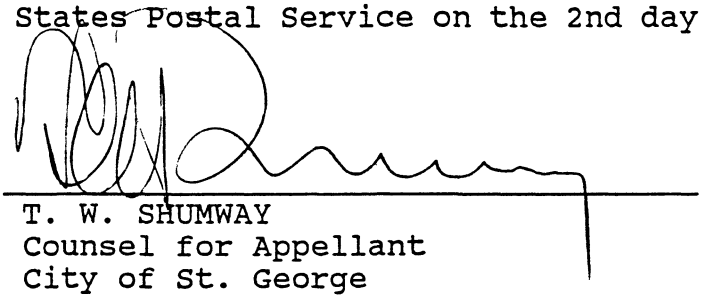
postage prepaid in the United States Postal Service on the 2nd day of December, 1991.



T. W. SHUMWAY
Counsel for Appellant
City of St. George

APPENDIX

A. Opinion of Appellate Court

COVER SHEET

CASE TITLE:

City of St. George,
Plaintiff and Appellee,
v. Case No. 890620-CA
Brent Allen Turner,
Defendant and Appellant.

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TRIAL JUDGE:

Honorable David L. Mower

June 6, 1991. OPINION (For Publication).

This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the circuit court herein be, and the same is, reversed.
Opinion of the Court by REGNAL W. GARFF, Judge; GREGORY K. ORME, Judge, concurs. NORMAN H. JACKSON, Judge, dissents by separate opinion.

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of June, 1991, a true and correct copy of the foregoing OPINION was deposited in the United States mail or personally delivered to each of the above parties.

Sheri Knighton
Deputy Clerk

TRIAL COURT:

IN THE UTAH COURT OF APPEALS

----ooOoo----

City of St. George, Plaintiff and Appellee,	)	OPINION (For Publication)
v.	)	Case No. 890620-CA
Brent Allen Turner, Defendant and Appellant.	)	F I L E D (June 6, 1991)

Fifth Circuit, St. George Department
The Honorable David L. Mower

Attorneys: Michael P. Zaccheo, Salt Lake City, for Appellant,
Alan B. Boyack, St. George, for Appellant
T. M. Shumway, St. George, for Appellee

Before Judges Garff, Jackson, and Orme.

GARFF, Judge:

INTRODUCTION

Appellant, Brent Allen Turner, appeals his conviction of displaying an obscene picture depicting sexual conduct in violation of St. George City Ordinance No. 2-77-2. We reverse.

FACTS

Turner operated a retail business in St. George, Utah, vending hard rock record albums and T-shirts. Turner's small, signless store was open during evening hours only. He was charged with violating the St. George obscenity ordinance for his display of three painted bed sheets which he used as wall hangings and which were visible to anyone entering the shop.

Several people made their "artistic" contributions to the sheets as they hung on the wall. The sheets appear to be a

collage consisting of various drawings and slogans in different sizes and styles. The paint appears to have been sprayed or brushed on. The pictures and slogans appear crude and simplistic. Several factors make some of the slogans and drawings impossible to discern from the record: the quality of the photographs in the exhibit, the draping of the sheets, and the fact that some stereo speakers appear in front of the sheets in the photographs. The slogans and drawings appear intended to confront and to offend, and are related to sexual, political, religious, and social themes.[1] The portion of the wall hangings that the prosecution claims violates the St. George ordinance supposedly portrays a woman reclining in a spread-eagled manner so as to expose her "pubic area," represented by three or four black paint spots. The face and head of the figure could conceivably be that of a dog. Next to the drawing of the woman is what has been represented to be an enlarged drawing of a woman's pubic area. Both renditions are crudely drawn, blurry and indistinct. The quality of the renderings could best be compared to the graffiti and drawings frequently found on the walls of a junior high school rest room.[2]

Turner was charged with violating St. George City Obscenity Ordinance No. 2-77-2 §§ 2a(1) and (2). The relevant portions of this lengthy ordinance are as follows:

> No person shall knowingly: (1) Distribute, display publicly, furnish or provide to any person any obscene material or performance.

St. George, Utah, Ord. No. 2-77-2, § 2a(1). "Obscene" is defined as

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1. The slogans include "Nuke My Ass," "Your [sic] Afraid Face it," "Group Sex," "Total Peace," "Fuck Authority," "Burn the Dead," "Eat It," "Live-Die Airborne," "Hell House," "Kill for God," "Run and Hide Death Will Find You!," "Sold Your Soul," "White Flys [sic] Will Eat Your Flesh," "The End," "And Unto You I Dedicate My Heart," and "My Right to The World." The drawings include a peace symbol, an MX missile, a swastika, some gravestones, some crosses, some international prohibitive symbols over the words "life" and "drugs," a smiling face, a gun, several skulls, some with cross bones, some with full skeletons, a door, a mushroom cloud, and a moon.

2. The dissent's description of the two drawings gives the impression one is looking at an explicit medical illustration

> any material or performance which, when taken as a whole and considered in the context of the contemporary standards of this community:
>
> (1) Appeals to prurient interest in sex;
> (2) Portrays sexual conduct in a patently offensive manner;
> (3) Has no serious literary, artistic, political or scientific value.

St. George, Utah, Ord. No. 2-77-2, § 1a. The ordinance provides a lengthy definition of "sexual conduct," the relevant portion of which is as follows:

> (2) Masturbation, excretion, excretory function or lewd exhibition of the genitals, including any explicit close-up representation of a human genital organ or a spread eagle exposure of female genital organs.

St. George, Utah, Ord. No. 2-77-2, § 1e (emphasis added).

A jury found Turner guilty. He now appeals his conviction on the grounds that (1) the obscenity ordinance was unconstitutional as applied to him, and (2) the ordinance is unconstitutionally vague and overbroad.

(Footnote 2 continued)
from Gray's Anatomy, or viewing an exact photograph of the area in question, leaving no room for dispute as to what the renditions depict. Such is simply not the case. The second drawing, described in such intimate detail, could just as easily be viewed as a beetle, a leaf, or a Zulu war shield. Or it might more closely resemble a fugitive ink blot from the Rorschach test ("A personality and intelligence test in which a subject interprets ten standard black or colored inkblot designs and reveals through his selectivity the manner in which intellectual and emotional factors are integrated in his perception of environmental stimuli." Webster's Medical Desk Dictionary (1986)). Because the drawings were sufficiently abstract so as to permit a variety of nonobscene interpretations, and because of the other reasons enumerated later in this opinion, the judge, as a matter of law, should have never permitted the issue to go to the jury.

FIRST AMENDMENT

In a case where we are required to weigh important first amendment values of freedom of speech against a charge of obscenity based on a statute or ordinance that is properly limited, we exercise independent review when necessary, and determine, as a matter of constitutional law, whether the material is to be protected. Jenkins v. Georgia, 418 U.S. 153, 160 (1974).[3]

In Miller v. California, 413 U.S. 15 (1973), the United States Supreme Court set forth its definition of obscenity. The standard has been elaborated in subsequent cases,[4] and it remains the standard for distinguishing between speech, which is protected by the first amendment of the United States Constitution, and obscenity, which is not considered speech and receives no such protection. Id. at 23; Paris Adult Theatre I v. Slaton, 413 U.S. 49, 54 (1973); Roth v. United States, 354 U.S. 476, 485 (1957).[5]

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3. "[T]he First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." Jenkins, 418 U.S. at 160 (quoting Miller v. California, 413 U.S. 15, 25 (1973)). See also, Jenkins, 418 U.S. at 163-64 (Brennan, J. concurring).

4. For example, Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) (elaboration of prurient interest); and Jenkins, 418 U.S. 153 (elaboration of community standards).

5. The prosecution argues that, because the record shop is near a school and because minors are likely to frequent the shop, we should apply the lower standard suggested in Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975) (discussing content-neutral time, place and manner regulations of speech). However, the St. George ordinance fails to regulate the time, place, or manner that sexually explicit material may be displayed, but instead, it places a content-based restriction on any display of sexually explicit material. Consequently, we must apply the stricter test set forth in Miller, 413 U.S. 15. Additionally, because the shop is unmarked and is only open evenings, when school is not in session, it does not appear that minors are especially likely to frequent the shop.

The Miller test is as follows:

> The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24 (quotations and citations omitted). The Miller test is basically incorporated into the St. George ordinance, except that the ordinance defines "sexual conduct" in ways not specifically mentioned in Miller. Specifically, the St. George ordinance prohibits the display of "any explicit close-up representation of . . . a spread eagle exposure of female genital organs." St. George, Utah, Ord. No. 2-77-2, § 1e. However, among the "plain examples" given by the Miller court as to what a statute or ordinance can define for regulation as patently offensive sexual conduct was the "lewd exhibition of the genitals." Miller, 413 U.S. at 25. We find that, insofar as the definition describes materials that "depict or describe patently offensive 'hard core' sexual conduct" and insofar as that sexual conduct passes muster under the Miller test, which it must under section 1(a) of the ordinance, the ordinance is within constitutional limits.[6] Jenkins, 418 U.S. at 160 (quoting Miller, 413 U.S. at 27).

PRURIENT INTEREST AND PATENTLY OFFENSIVE

The first prong of the Miller analysis requires the trier of fact to determine whether the "'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest." Miller v. California, 413 U.S. 15, 24 (1973) (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

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6. Because we reverse on other grounds, we do not consider whether the depiction at issue is lewd.

Material that appeals to the prurient interest does not include "material that provoke[s] only normal, healthy sexual desires." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985). Rather, it applies to material that provokes "sexual responses over and beyond those that would be characterized as normal." Id. Specifically, "prurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex . . . ." Id. at 504.

The second prong of the Miller analysis is "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." Miller, 413 U.S. at 24.

When determining what appeals to the prurient interest and what is patently offensive, the jury is not allowed unbridled discretion. Jenkins v. Georgia, 418 U.S. 153, 160 (1974). The trial judge has a significant role in defining the extent of the jury's discretion. "Application of the obscenity standard involves a subjective element on the part of the tribunal--judge, jury or both--making the critical determination." Huffman v. United States, 470 F.2d 386, 397 (D.C. Cir. 1971) (rev'd on other grounds, 502 F.2d 419 (D.C. Cir. 1974)). In addition, jury discretion is subject to independent appellate review, when necessary, and by the requirement that only depictions of patently offensive hard core sexual conduct be subject to prosecution. Jenkins, 418 U.S. at 160. Therefore, in Jenkins, the Supreme Court did not hesitate to invade the province of the jury, which the Georgia Supreme Court had refused to do. In overturning the verdict, the Supreme Court ruled that the jury did not have sole discretion to determine that the film Carnal Knowledge was obscene, and substituted its judgment for that of the jury because, it concluded, it was "simply not the 'public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain' which we said was punishable in Miller." 418 U.S. at 162 (quoting Miller, 413 U.S. at 35). Thus, there is a constitutional threshold of "hard-coreness" that must be met.

Not only must the statute or ordinance be constitutionally explicit, but the trial court has the responsibility to make a threshold determination as to whether a work may depict hard-core sexual conduct. Only after the court has reached this conclusion is it appropriate to turn the matter over to the jury to apply the first two prongs of the

Miller test.[7] Accordingly, we consider whether the trial court correctly made the threshold determination contemplated in Jenkins.[8] The court, in its pretrial order denying a motion to dismiss, found that "the words and drawing described herein

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7. In a recent case, State v. Ramirez, 159 Utah Adv. Rep. 7 (1991), the Utah Supreme Court commented on the distinctions between the overlapping roles of the trial court and the jury. Even though Ramirez was concerned with the admission of eyewitness identification, we find the court's comments appropriate here where the trial court has to make a preliminary determination of obscenity when that same issue will have to be redetermined by the jury when the evidence is considered:

> Potential for role confusion and for erosion of constitutional guarantees inheres in this overlap of responsibility of judge and jury to determine the same issue. Because the jury is not bound by the judge's preliminary factual determination made in ruling on admissibility[/obscenity] the trial court may be tempted to abdicate its charge as gatekeeper to carefully scrutinize proffered evidence for constitutional defects and may simply admit the evidence, leaving all questions pertinent to its reliability[/obscenity] to the jury. But courts cannot properly sidestep their responsibility to perform the required constitutional admissibility[/obscenity] analysis. To do so would leave protection of constitutional rights to the whim of a jury and would abandon the courts' responsibility to apply the law.

159 Utah Adv. Rep. at 9.

8. "Judges . . . must take care lest they decide these cases on the basis simply of their indignation and disgust with the kind of trash presented. The First Amendment extends to trash, if it stops short of obscenity . . . ." Huffman, 470 F.2d at 396. Even though a piece may be "dismally unpleasant, uncouth and tawdry," that alone "is not enough to make [it] 'obscene.'" Manual Enter. v. Day, 370 U.S. 478, 490 (1962).

arguably suggest an act which would constitute a violation of the ordinance, i.e., an act of oral-genital contact."

While the spray painted drawings depict representations of genitalia, the drawings are too crudely rendered to be salacious or titillating or to provoke sexual responses, normal or healthy, much less those that are "over and beyond those that would be characterized as normal." Brockett, 472 U.S. at 498. "Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic." Cohen v. California, 403 U.S. 15, 20 (1971). The arresting officer admitted as much at trial. Even though the drawings are vulgar, offensive, and confrontational, they are too sketchy and abstract to appeal "to a shameful or morbid interest in sex." Brockett, 472 U.S. at 504.[9] The trial court's pretrial finding of an "arguable suggestion" is not sufficient to meet the constitutional test, and our own review of the evidence leads us to the conclusion that, as a matter of law, these renderings are not "public portrayal[s] of hard-core sexual conduct for its own sake, and for the ensuing commercial gain." Jenkins, 418 U.S. at 161 (quoting Miller, 413 U.S. at 35).

Moreover, we cannot judge the drawings in isolation, but must also consider the written material and other symbols because Miller requires us to view the collage "taken as a whole" in determining its appeal to the prurient interest. 413 U.S. at 24. In Kois v. Wisconsin, 408 U.S. 229 (1972),[10] the

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9. "The First Amendment protection for the depiction of nude women applies even . . . where the pictures focus upon the pubic areas and poses are struck in such a way as to emphasize the female genitalia." Huffman, 470 F.2d at 401.

10. Although Kois preceded Miller, Miller frequently cites the case with approval, indicating an intent to reaffirm the decision and its analysis. Miller, 413 U.S. at 23, 24, 25, 26, 35, 37. Also, the test in Kois was whether "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Kois, 408 U.S. at 230 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)). Although this phrase implies that the Kois phrase "taken as a whole" applies only to the first part of the Miller test, the crux of Kois was whether an allegedly obscene depiction had political value. We think the Kois analysis of "taken as a whole" is helpful in both the first and third prongs of the Miller test.

Supreme Court considered the context in which an allegedly obscene work was displayed. Kois involved the publication of a photograph of an embracing nude couple, similar to one confiscated by a Wisconsin district attorney. Because the accompanying article was about the confiscation, the Court held that the picture was newsworthy and thus protected. Laying a foundation for what would later be the third prong of the Miller analysis, the Court held that context could redeem an otherwise obscene picture, where there is some contextual relativity between the offending portion and the rest of the work: "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication." 408 U.S. at 231. The Court held that because the picture was "rationally related" and "relevant to the theme of the article," it was "clearly entitled" to protection. Id.

Here, the two drawings do not appear as a sham attempt to insulate obscene material with protected material. That is, while the two drawings may be more confrontational and vulgar than what appears on the rest of the bedsheets, they are not entirely out of context with the other depictions of political, philosophical, musical, social and sexual themes. Because the work is a collage, there is not a close relationship among all the slogans and symbols. However, a close relationship is not the requirement; a rational relationship is. Kois, 407 U.S. at 231.[11]

The two drawings meet the Kois test because they rationally relate to the immediate context (the wall hangings) and to the broader context (the record store). The immediate context is a collage of various symbols and phrases. The broader context is that of a hard rock record store which vends heavy metal music, which music is intended, in part, to challenge traditional ideas and modes of thinking.

Therefore, even if we were to concede, which we do not, that the two key drawings appeal to the prurient interest and are patently offensive, we cannot see how the entire collage, taken as a whole, is so.

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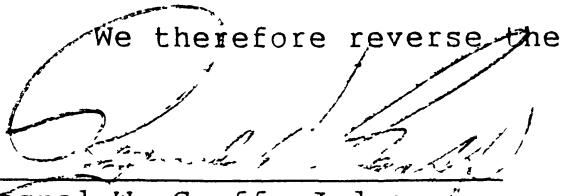
11. The Kois Court's use of the phrase "rationally related" suggests a low level of integration between an offending picture and its larger context. See E. Main, The Neglected Prong of the Miller Test for Obscenity: Serious Literary, Artistic, Political, or Scientific Value, 11 S. Ill. Univ. L.J. 1159, 1163-64 (1987).

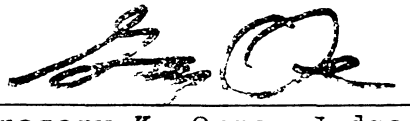
Because we conclude, as a matter of law, that the drawings themselves do not appeal to the prurient interest and are not patently offensive, and because the drawings rationally relate to the rest of the collage, which, taken as a whole, is not patently offensive and does not appeal to the prurient interest, we find that the drawings are not in violation of the St. George ordinance.

We therefore reverse the conviction.



Regnal W. Garff, Judge.

I CONCUR:



Gregory K. Orme, Judge

JACKSON, Judge (dissenting):

INTRODUCTION

I would affirm Mr. Turner's conviction. He was tried by a jury of his peers and found guilty of violating an ordinance which specifically defined constitutionally obscene materials. Mr. Turner was provided fair notice that lewd exhibition of human genitals to the St. George public, including spread-eagle exposure of female genital organs, would bring prosecution. Miller v. California, 413 U.S. 15, 25 (1973) provides "plain examples of what a state statute [or city ordinance] could define [as obscenity] for regulation . . . ." One of Miller's plain examples of "hard core" sexual conduct is representation of "lewd exhibition of the genitals." Id. Thus, the trial judge could reasonably determine that the ordinance contained a constitutionally proper and specific definition of obscenity and that Turner's exhibition of the nude spread-eagle female and a separate enlarged detailed vulva with open vagina, exposed labia and clitoris was in violation of the constitutionally valid ordinance. Accordingly, the trial judge properly submitted the case to the jury for determination after denying a pretrial motion to dismiss based only on submission of Turner's drawings and the city ordinance. The jury saw the materials, heard the evidence and determined that Turner's materials were obscene and that he had displayed them to unwarned members of the public in violation of the city ordinance.[1]

FACTS

The statement of "facts" in the main opinion reads like a subjective treatise in art appreciation, assessing the quality of Turner's art work as "crude," "simplistic," "abstract," "indistinct" and "blurry." However, this attack of adjectives is irrelevant. The Supreme Court has not indicated that tasteful, mature, high quality obscenity should be suppressed or that untasteful, immature, low quality obscenity should go without regulation. On the other hand, the opinion does recognize that the "indistinct" drawing is in fact "a woman reclining in a spread-eagled manner (facing the viewer) so as to expose her pubic area." The opinion also recognizes the

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1. Since Turner accepted the jury instructions "as constituted," no exceptions, I must conclude that the jury was properly instructed regarding applicable law.

drawing next to the woman as a large depiction of a woman's pubic area but evaluates it as "blurry." These observations are highly relevant. This "blurry" drawing (in shades of red and pink) graphically depicts all of the external female genitalia. This vulva is surrounded by depictions of pubic hair done in black. "Genitalia," the word in Miller and the St. George ordinance, means the reproductive organs, especially the external sex organs. The American Heritage Dictionary, Second College Edition 553 (1985). Despite the majority's protestation in footnote 2 that Turner's depictions might resemble something else, Turner testified that they were a nude woman and an enlargement of a "girl's vagina."

Turner's vulva depiction occupies the center of the sheet (side to side) with the top of the vulva at the center of the sheet (top to bottom). On the lower half of the sheet, the left third is occupied by the words of a question with the nude woman underneath. The question done in black over yellow is:

> "Why Not Let
> Some One Else
> Think For You?"

The upper half of the vulva and pubic hair depiction is immediately to the right of the three lines in the question. Between the question and the nude woman is: "Tuna Factory x x x x" inscribed in a green banner over her head. Between the nude woman and the vulva is a small sign post with the words "Tunnel of Love" and a yellow arrow points from the sign to the lower half of the vulva and pubic hair. Underneath the vulva and hair are the words "Keep Out" in red. To the right of the vulva and hair in black are the words:

> "It's
> Mine
> All Mine"

The upper half of the sheet has these slogans across the top (left to right): "My Right to the World," "Your (sic) Afraid Face It" and "Live For Yourself" and a round bomb with "Drugs" inscribed on it. Underneath these items and across the lower portion of the upper half (left to right) are a skull, a swastika, a "13," a happy face, and a shield with "AA" on it.

SCOPE OF APPELLATE REVIEW

The majority disposes of the jury's verdict by virtue of a "hard core" attack (without defining hard core) and by use

of a "loose" definition of the scope of appellate review in mounting tne attack. Their opinion, citing Jenkins v. Georgia, 418 U.S. 153, 160 (1974), states that "the jury is not allowed unbridled discretion" in making its obscenity determination. Then the majority claims that Jenkins demonstrates that the appellate court should "not hesitate to invade the province of the jury" and to "substitute its judgment" for the jury's judgment because the jury "does not have sole discretion" to make the obscenity determination. I will first discuss scope of appellate review and then address the meaning of "hard core" and the "average person test" in response to the above posturing of the main opinion. Later in my opinion I will reach the main opinion's backup position regarding the context of Turner's work taken "as a whole."

I agree that the jury does not have unbridled discretion in an obscenity case. But I also note that my appellate colleagues do not have unbridled discretion on review. Our function is to restrict both the legal and factual determinations to the constitutional guidelines set forth in Miller. Miller states that the elements of obscenity--prurient interest, patent offensiveness and lack of serious value--are to be determined by the trier of fact, i.e., the jury. 413 U.S. at 26 & n.9; see also Smith v. United States, 431 U.S. 291, 308 (1977). Further, prurient interest and patent offensiveness are to be measured by the test of an average person in the community applying contemporary community standards, which I will discuss in detail below. Thus, we must give the jury's findings on those elements a fair measure of deference, particularly in a close case. That does not mean that obscenity convictions will be virtually unreviewable. Smith, 431 U.S. at 305. But, "[d]eterminations of prurient interest and patent offensiveness, and also, therefore, of contemporary community standards, are such as to indicate that the major determination should be made by the jury, except in the more extreme cases." F. Schauer, The Law of Obscenity at 150-51 (1976)(footnotes omitted)[hereinafter Schauer]. Since the serious value element is to be measured by a "reasonable person" standard, this determination is more amenable to appellate review. See Smith, 431 U.S. at 305.

> [I]t is also significant to note the further indication of this decision [Hamling v. United States, 418 U.S. 87 (1974)] that although all of the elements of the Supreme Court's obscenity tests have a constitutional basis, only the

> [serious] value standard is really a question of fundamental constitutional rights. The other tests are mainly questions of fact requiring a less rigid standard of review.

Schauer at 125 (emphasis added).

Because the majority fails to recognize the proper scope of appellate review, it answers the wrong question. Thus, the analysis quickly adopts a finding that Turner's "renderings are not public portrayals of hard core sexual conduct", i.e., the renderings are not obscene. Our function is not to answer the question of whether Turner's materials are obscene--as the majority has done. Our function is to answer the question of whether Turner's materials created a jury question as to obscenity--as the majority has not done.

The appellate court should review each Miller element and determine as to that element whether a jury issue has been created. Instead, the majority disposes of the jury's obscenity verdict by exercise of their own "hard core" judgment.

A. The "Hard Core" Judgment

In Huffman, the United States Court of Appeals for the D.C. Circuit correctly observed that prior to 1971, the United States Supreme Court had not defined the term "hard core" pornography.[2] Huffman v. United States, 470 F.2d 386, 393 n.9 (1971) rev'd, 502 F.2d 419 (D.C. Cir. 1974). The Supreme Court did not define "hard core" until 1973 in Miller which set forth specific examples. If material which has failed to pass the Miller tests for obscenity looks like something different than Miller's examples, then the jury or trial judge has erred in application of at least one of the tests. Schauer at 113. The main opinion relies on Jenkins v. Georgia, 418 U.S. 153, 162 (1974) as the basis of its obscenity determination, holding that Turner's drawings do not depict "hard core" sexual conduct. But

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2. The main opinion relies on Huffman, a pre-Miller and pre-Jenkins circuit case for language to support its "hard core" pornography argument. See nn. 7 & 8. Further, the opinion utilizes Huffman to support its scope of review position.

the opinion fails to examine the meaning of "hard core."[3] Thus, before examining our case in the light of Jenkins, I turn to Miller for the definitive meaning of "hard core."

Miller states "for the first time since Roth [v. United States, 354 U.S. 476] was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment." Miller, 413 U.S. at 29 (emphasis added). The Miller guidelines include concrete examples of "hard core" materials. One of those examples is "lewd exhibition of the genitals." Id. at 25. This example isolates as "hard core" the very materials described in the St. George ordinance and exhibited by Turner. His depictions and descriptions consist of genital imagery and sexual conduct. Since Miller, the depiction of sexual conduct does not necessarily require motion or activity.[4] Jenkins

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3. Miller states that under its holding "no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law. . . ." Miller, 413 U.S. at 27. "Depict" means to present a lifelike image of. Roget's II, The New Thesaurus 246 (1980). "Describe" means to give a verbal account of. Id. at 250. Thus, "hard core" sexual conduct can be presented in images or words.

4. Professor Schauer has stated:

> In 1973, however, the Supreme Court specifically stated that only the depiction of "hard-core" sexual conduct may be prohibited. As examples of what might be included, the Court indicated the following:
>
> > (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
> > (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.
>
> This definition seems to make it clear that hard-core pornography may include things other than actual sexual congress or activity, contrary to the views of a

states that "we made it plain that under that holding [Miller] 'no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct . . . .'" Jenkins, 418 U.S. at 160 (emphasis added)(quoting Miller, 413 U.S. at 27).

Jenkins reiterates the following definitions of "hard core" as first set forth in Miller:

> We also took pains in Miller to "give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced," that is, the requirement of patent offensiveness. Id., at 25, 93 S.Ct., at 2615. These examples include "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." Ibid. While this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination. It would be wholly at odds with this aspect of Miller to uphold an obscenity conviction based upon a defendant's depiction of a woman with a bare midriff, even though a properly charged jury unanimously agreed on a verdict of guilty.

(Footnote 4 continued)
number of other courts prior to Miller. These views seemed based primarily on the Redrup [v. New York, 386 U.S. 767 (1967)] reversals of the Supreme Court, since for a number of years after 1967 the Court reversed any obscenity conviction where the material did not display actual sexual activity, regardless of the lewd or suggestive poses of individual models. Schauer at 111.

Jenkins, 418 U.S. at 160-61 (emphasis added). Jenkins was a "bare midriff" case. Our case is not. Miller does not mention bare midriffs or mere nudity. Miller specifically defines lewd exhibition of the "genitals." This is our case. In Jenkins the Supreme Court viewed the film Carnal Knowledge and observed:

> While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the Miller standards.

Id. at 161 (emphasis added).

Having observed that the film depicted "nudity" only and not "genitals", the Supreme Court held that "the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way. . . ." Id. at 161. Jenkins and Miller both tell us what can be defined as "hard core," i.e., lewd exhibition of the genitals. Jenkins tells us one thing that can not be considered "hard core," i.e., a bare midriff. Jenkins simply does not grant my colleagues discretion on review to hold as a matter of constitutional law that Turner's depictions and exhibition of female genitalia were clearly not obscene and did not create an issue for the jury. To the contrary, Jenkins and Miller stand for the proposition that St. George could define, and prohibit as "hard core" obscenity, the lewd exhibition of the genitals--even if only by "representation." Miller, 413 U.S. at 25. The St. George ordinance adopted the Miller definition. Professor Schauer has stated:

> But now, after Miller, it is clear that hard-core pornography may include material which does not depict sexual acts, and "lewd exhibition of the genitals" is specifically included. This should be interpreted in the light of a number of lower court cases defining hard-core pornography to include photographs which focus on, exaggerate, or emphasize the

> genitalia or "erogenous zones." It is this exaggeration or "highlight" on the genitalia which often distinguishes hard-core pornography from mere nudity.

Schauer at 111-112.

Turner elected to exhibit materials which highlight and amplify female genitalia, one of Miller's specific examples of "hard core." In fact, Turner described the vulva drawing as: "It's supposed to be a very-enlarged portion of the girl's pubic area" and the "tunnel of love" represents "a girl's vagina." Turner's depictions are a form of hard core pornography well within the types of permissibly proscribed depictions set forth in Miller and the St. George ordinance. Accordingly, Turner's materials were sufficient to clearly present a jury issue as to obscenity. As promised, I now turn to further consideration of the average person test because the majority has not given proper deference to this test and has substituted their own personal judgments for that of the jury.

B. The Average Person Test

1. Test Applies to Prurient Interest and Patently Offensive Elements

In 1957, Roth replaced the "most susceptible" person test of obscenity with the "average person" test. Miller reaffirmed this test by reciting Roth:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest.

Miller, 413 U.S. at 24 (quoting Roth, 354 U.S. at 489).

The Miller Court rejected a national "community standard" as an exercise in futility. In so doing, the Court relied on the dissent of Mr. Chief Justice Warren in Jacobellis v. Ohio, 378 U.S. 184 (1964) which stated:

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public

> depiction of conduct found tolerable in Las Vegas, or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.

Jacobellis, 378 U.S. at 200 (citations omitted).

In accord with the above rationale, the Miller Court held "that obscenity is to be determined by applying 'contemporary community standards', 'not national standards'." Miller, 413 U.S. at 31-32. Miller analyzed this new standard in relation to both the prurient interest and the patent offensiveness tests. Both of those tests require a less rigid standard of review because they are principally questions of fact. The jurors are to apply this standard as would the average person in their community. Accordingly, the jurors' analytical process is as follows: (1) determine, from their own knowledge of the community, the sense of the average person in the community; (2) determine from their own knowledge of the community contemporary community standards; (3) apply those standards to the work in question and make judgments regarding appeal to the prurient interest and patent offensiveness. If these judgments by the jury are in the affirmative, the work is obscene. If either of these judgments is in the negative, the work is not obscene. Thus, only the serious value element of Miller presents a question regarding fundamental constitutional rights. See, e.g., Schauer at 125. If the work is obscene, the jury then determines whether it has serious value which would save it. This is done by applying the reasonable person test. Pope v. Illinois, 481 U.S. 497 (1987).

2. The Average Person

Who is the mysterious average person? He or she is neither the most immune nor the most susceptible. "[O]bscenity is to be judged according to the average person in the community, rather than the most prudish or the most tolerant." Smith v. United States, 431 U.S. 291, 304 (1977). The Miller opinion stated the primary concern in requiring a jury to apply this standard is that the material "will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person--or indeed a totally insensitive one." Miller, 413 U.S. at 33. I note the continuing emphasis that it is the individual juror who must divine the standards of the average person in the local

community. Because this factual judgment is to be exercised by the peer juror, the prosecution need not produce "expert" witnesses to testify as to obscenity. Kaplan v. California, 413 U.S. 115, 121-22 (1973). The juror knows as well as any expert who the average person is and what the contemporary community standards are. See Paris Adult Theater I v. Slaton, 413 U.S. 49, 56 (1973). The Supreme Court has stated:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.

Hamling v. United States, 418 U.S. 87, 104-05 (1974), quoted in Smith, 431 U.S. at 302.

This standard requires each juror to tap his or her knowledge of his or her community in deciding what obscenity conclusion the average person in the community, applying contemporary community standards, would reach in a particular case. Thus, the appellate judge has a formidable, if not impossible task, in second guessing the juror's personal draw on his or her "knowledge of the community." How does the appellate judge divine the sense of the average person in a distant community where the appellate judge does not reside or has little, if any, personal knowledge of community mores on which to draw? Expert witnesses? Not required. "[I]n 'the cases in which this Court has decided obscenity questions since Roth, it has regarded the materials as sufficient in themselves for the determination of the question.'" Kaplan, 413 U.S. at 122 (quoting Ginzburg v. United States, 383 U.S. 463, 465 (1966)). How about the local statute? Introduced here. Helpful evidence, but not conclusive. "[T]he local statute on obscenity provides relevant evidence of the mores of the community whose legislative body enacted the law." Smith, 431 U.S. at 308. Smith held, as did Miller, that the issues of prurient interest and patent offensiveness "are fact questions for the jury, to be judged in the light of the jurors' understanding of contemporary community standards." Id. at 300-01. Thus, we see that the jury is uniquely qualified to exercise this particular judgment, i.e., the average person applying contemporary community standards. They must "consider the entire community and not simply their own subjective reactions or the reactions, of a sensitive or of a callous

minority." Id. at 305. And in this case, my appellate colleagues have little evidence of local community standards other than the juror's judgment which has been exercised.[5] Here, the basic evidence of community mores was each juror's personal knowledge of local standards and the St. George ordinance. The St. George ordinance contains the Miller definitions of hard core obscenity. The ordinance is substantial evidence of a community standard that genitalia will not be lewdly depicted and displayed to the public. Turner elected to exhibit genitalia, as proscribed, to the unwarned members of the public including juveniles who entered his place of business. His public exhibition of hard core materials created questions for the jury regarding prurient interest and patent offensiveness. The jury applied the "average person" test under contemporary community standards and found in the affirmative. Again, the majority has not definitively answered the question of whether a jury question had been created on these issues. Instead, the majority, without acknowledging the "average person" test simply substitutes their individual judgments for the judgments exercised by the jury and summarily announce their own factual findings (dressed up as conclusions of law) in the negative stating:

> Because we conclude . . . that the drawings themselves do not appeal to the prurient interest and are not patently offensive and because the drawings rationally relate to the rest of the collage . . . taken as a whole . . . we find the drawings are not in violation of the St. George Ordinance.

TURNER'S WORK "AS A WHOLE"

Since the majority concluded that Turner's work failed the "hard core" requirement, that should have been the end of the

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5. The defense called four witnesses ostensibly to testify regarding community standards. One had purchased some "mens'" magazines at some convenience stores in Washington County. Another had seen "R" rated movies in St. George, including Sea of Love and Skin Deep, but no "X" rated movies. One indicated that there were literary works available in Southern Utah which contained the "F" word, and the last described the place of nudes in 20th century art. None testified as "experts" nor stated "expert opinions" regarding community standards.

opinion, as in Jenkins v. Georgia, 418 U.S. 153 (1974) on which they rely. Nevertheless, the opinion tries to further save the work from the jury's obscenity determination by analyzing Turner's work "as a whole."[6]

A. Context or Unit of Perception

Obscenity cases have dealt with a book, a movie, a magazine article, a cartoon, a brochure, each as a unit of perception.[7] What material displayed by Turner is the logical

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6. The majority tries to save Turner's work from the jury's obscenity determination by relying completely on the curious per curiam case of Kois v. Wisconsin, 408 U.S. 229 (1972) for its "as a whole" analysis. I observe some problems with this reliance on Kois.

First, Kois was a pre-Miller case. Kois is divided into two sections using different analyses to dispose of two separate criminal offenses: (1) an underground newspaper article which included a photo of a nude couple embracing and (2) a book of poems which included a poem describing sexual intercourse.

Second, since Kois was a pre-Miller, "national" community standards case, the Supreme Court's scope of review was broader than it would be post-Miller, applying "local" community standards.

Third, Miller requires a different analytical approach than was applied in the sex poem section of Kois. There, the Court looked at the "artistic" value of the poem in question and considered it to be in the realm of "serious art." From that premise, the Court decided the dominant theme of the poem did not appeal to the prurient interest. Under Miller "serious value" of the work is examined last and only after the work has failed the prurient interest and patent offensiveness tests. If so, "serious value" is examined to determine if the work has value which can save it.

7. The trial judge, the jurors and the appellate judges should observe the complete "work" as a unit of perception. See generally Kaplan v. California, 413 U.S. 115 (1973) (book); Jenkins v. Georgia, 418 U.S. 153 (1974) (movie); Penthouse Intern., Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir.), cert. dismissed, 447 U.S. 931 (1980) (magazine); Papish v. Board of Curators, 410 U.S. 667 (1973)(per curiam)(political cartoon); Hamling v. United States, 418 U.S. 87 (1984) (advertising brochure).

unit of perception? The prosecution offered two separate sheets as units of perception each depicting offensive material. Turner testified that one of the sheets which contained, among other slogans and depictions, the words "Group Sex" and "Eat It, Eat Me" was prepared four years earlier as part of a Halloween motif. Accordingly, it did not bear any time relation or context relation to the other sheet depicting the nude and vulva. Further, Turner's counsel argued to the trial court that the two sheets were "totally" separate and different works. The main opinion disregards Turner's view and identifies Turner's "hard rock record store," including the "collage" of wall hangings, as the unit of perception. I agree with Turner and his counsel that the logical unit of perception is to view each of Turner's sheets as separate "paintings" or works. Turner's painting (sheet depicting the nude female and vulva), described in detail in my "facts" section above, is the work or unit of perception at issue in this case. Thus, the single sheet is the "work" to be "taken as a whole" in the analysis.

B. Dominant Theme

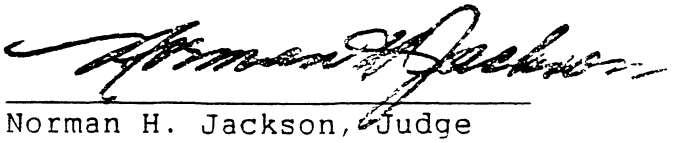
The question to be asked by trial judge, jury and appellate judge is:

> whether the objectionable materials are related to text or other materials which are themselves constitutionally protected, or whether the text [or other materials are] merely asserted as a sham to attempt to shield commercial pornography in a cloak of legitimacy.

Schauer at 106.

Turner was unable to articulate any text or theme for the materials on his painting exclusive of the nude and vulva. His testimony reveals that he had no clear theme. He was not sure, but he believed his painting "resembles political commentary." Even Turner's brief concedes that the theme of his "bed sheets is admittedly difficult to identify precisely." Thus, the jury, applying the "average person test" could reasonably conclude that the objectionable sexual depictions and descriptions could not possibly relate to the other materials on the sheet because they were themeless, i.e., a diverse collection of ideas. Further, even if the other materials set forth a clear "political" theme, the jury could reasonably conclude that the "sexual" materials had nothing to do with politics. Moreover, since Turner testified that the two sexual

depictions were the first materials placed on the sheets (and the other materials added later had no theme or were not related, if they had a theme), the jury could have reasonably concluded that the materials added to the top of the sheet were indeed a sham attempt by Turner to insulate or shield obscene material (the lower half of the sheet) with non-obscene material. Turner could not identify a dominant theme.[8] Since he could not, the jury had a basis on which to conclude that Turner's "themeless" materials were merely a sham attempt to insulate his "objectionable" materials.



Norman H. Jackson, Judge

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8. The majority creates a "rational relationship" among Turner's diverse "political, philosophical, musical, social and sexual themes" by calling his work a collage. Thus, several entirely unrelated themes are made the "dominant theme" of the majority with the store as the "context." Accordingly, the offensive depictions, as part of the collage, in this large context, are simply meaningless, i.e., not obscene.

> This would occur, for example, if the most obscene items conceivable were inserted between each of the books of the Bible. But under existing law, the judges and juries are able to identify shams in which non-obscene material is used as a vehicle to insulate obscene material. As established in Ginzburg, the "taken as a whole" test is not quantitative. Under Miller, even one obscene item contained in a work would be sufficient to support a finding that the entire publication is obscene if, "taken as a whole," the publication lacks serious value. The "taken as a whole" test is not inconsistent with the recognition of shams.

Penthouse Intern., Ltd. v. McAuliffe, 610 F.2d 1353, 1368 (5th Cir. 1980)(footnote omitted).